Live Capital Sdn Bhd v Pioneer Conglomerate Sdn Bhd

FEDERAL COURT (PUTRAJAYA) — CIVIL APPEAL NO 02(f)-65–11 OF 2023(W)
ABDUL RAHMAN SEBLI CJ (SABAH AND SARAWAK), ABU BAKAR JAIS AND VAZEER ALAM FCJJ
5 JUNE 2025

Evidence — Documentary evidence — Admissibility of — Dispute over authenticity and veracity of payment vouchers — Respondent claimed against appellant for return of loan while appellant asserted it was agreed commission that was non-refundable — Payment vouchers initially marked for identification purposes only was later converted to exhibits — Whether where contents/notations written on document were disputed and alleged to have been added after document was signed/initialled, contents/notations were deemed proven upon document being marked as exhibit at trial — Whether where contents/notations written on document were disputed and alleged to have been added after document was signed/initialled, it was incumbent upon party relying on document and disputed contents/notations to call maker of document and/or author of contents/notations to prove same — Whether when document was tendered and marked as exhibit during trial, it was incumbent upon court to treat entire contents of said document as having been proven — Whether where document had been tendered and marked as exhibit during trial and part of its contents were disputed, court was obliged to assess veracity, truthfulness of contents of said document and weight to be given to said document on basis of oral and other documentary evidence adduced before court — Evidence Act 1950 s 73A(1)

On 31 May 2019, the respondent filed a civil action in the High Court against the appellant for the return of an interest free loan of RM7m that it had advanced to the appellant vide two cheques in the sums of RM5m and RM2m respectively. The appellant admitted that it had received the said sum of RM7m from the respondent but denied that it was an interest-free loan as claimed by the respondent. Rather, it was an agreed commission fee for the brokerage services it provided to the respondent for the acquisition of Ta Win Sdn Bhd shares, a public listed company, which the respondent intended to take control of, and therefore non-refundable. The respondent prepared two vouchers for the issuance of the two cheques. DW2 who testified on behalf of the appellant confirmed that the signature on the voucher was his signature but alleged that the typewritten words 'Being paid as Advance to Tenggara Kapital Sdn Bhd' were not there at the time he signed the document (Tenggara Kapital Sdn Bhd was the former name of the appellant). For the second voucher, there was a deletion. The typed-out words 'Being ===' had been substituted with the handwritten notation 'Advance to Tenggara'. This handwritten notation was

not there when DW2 signed the document. The typewritten words and handwritten notation gave the impression that the sum was an advance as claimed by the respondent and not a commission as pleaded by the appellant in its defence. It was agreed by both parties that the two vouchers were Part C documents, which meant both the authenticity and contents of the documents were disputed and required strict proof. At the trial, the admissibility of the vouchers became an issue. During the examination-in-chief of PW1, he identified the two vouchers as the vouchers that his company prepared for the issuance of the two cheques, following which counsel asked for the documents to be marked as IDP1 and IDP2. Learned counsel for the respondent had asked for IDP1 and IDP2 to be marked as exhs P1 and P2 after DW2 confirmed that the signatures on the two vouchers were his signatures. The learned judicial commissioner ('JC') resolved the disagreement by marking IDP1 and IDP2 as exhs P1 and P2 'conditionally'. In dismissing the respondent's claim, the JC accepted DW2's evidence that the notation and alterations on the two vouchers were not there when DW2 signed them, which meant they were added or altered by someone unknown to DW2 after he signed them. However, the Court of Appeal reversed the whole decision of the High Court. It was the failure by the appellant to discharge the evidential burden of proof that led the Court of Appeal into accepting the contents of the two vouchers P1 and P2 as the truth, thus providing the respondent with sufficient evidence to prove its claim that the RM7m was an advance and not a commission. The appellant had been granted leave to appeal with the following questions of law: (a) where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, are the contents/notations deemed proven upon the document being marked as an exhibit at trial ('question 1'); (b) where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, is it incumbent upon the party relying on the document and the disputed contents/notations to call the maker of the document and/or the author of the contents/notations to prove the same ('question 2'); (c) when a document is tendered and marked as an exhibit during a trial, is it incumbent upon the court to treat the entire contents of the said document as having been proven ('question 3'); and (d) where a document has been tendered and marked as an exhibit during a trial and part of its contents are disputed, is the court obliged to assess the veracity, truthfulness of the contents of the said document and the weight to be given to the said document on the basis of the oral and other documentary evidence adduced before the court ('question 4').

Held, allowing the appeal:

(1) It was factually incorrect for the Court of Appeal to say that the respondent had produced the originals of the two vouchers as they were never produced at the trial. The two vouchers, which were initially marked IDP1 and IDP2 (for identification purposes only), were

converted to exhs P1 and P2 (as proof of authenticity and truth of contents) after DW2 identified his signatures on the two vouchers. P1 and P2 were not the originals of the two vouchers (see para 21).

(2) It was wrong for the Court of Appeal to have imposed evidential burden of proof on the appellant. Before any burden legal or evidential shifted to the appellant, it must first be shown that the respondent had succeeded in establishing a prima facie case against the appellant. For the respondent to make out a prima facie case against the appellant or, to put it another way, to prove its case sufficiently to justify a judgment in its favour if there was no other evidence, it was incumbent on the respondent to prove, on the balance of probabilities, that the two vouchers P1 and P2 were both authentic and contained the truth. More importantly, for P1 and P2 to be used as evidence in support of the respondent's claim, they must first be proved to have been properly admitted in evidence (see paras 22, 24 & 26).

(3) Section 73A(1) of the Evidence Act 1950 did not apply in favour of the respondent. First, P1 and P2 were not the originals of the two vouchers and secondly, no reasonable effort was made to find the maker or makers of the documents. Unless the authenticity of the two vouchers had been verified by calling the maker or makers of the documents, the contents of the documents remained hearsay as the purpose of producing them was to prove the truth of the contents and not merely to prove that the notation and alterations were made. The fact that DW2 signed on the two payment vouchers did not make him the maker of the documents as the dispute was not over his signatures but over the authenticity and truth of the contents. It was therefore wrong for the JC to have converted IDP1 and IDP2 to exhs P1 and P2 simply because DW2 confirmed that the signatures on the two documents were his signatures. Both the clerk and the company secretary of the respondent would have been in a position to adduce the best evidence available as they would be able to testify on the notation and alterations on the two payment vouchers. No explanation was proffered as to why these witnesses were not called or made available at the trial. The JC was therefore justified in the circumstances to draw adverse inference against the respondent for failing to call the maker or makers of exhs P1 and P2. It was clear that at the close of its case, the respondent produced no credible evidence documentary or otherwise to prove, on a prima facie basis, that the RM7m was an advance and not a commission. There was therefore nothing for the appellant to answer to the respondent's claim that the RM7m was an advance and not a commission (see paras 28, 32 & 34–36).

(4) While the Court of Appeal was correct in disallowing the appellant from raising the issue of forgery on the ground that it was not pleaded, it was a contradiction in terms for it to then place the evidential burden of proof

on the appellant to prove forgery of the two vouchers, on the ground that the contents of the vouchers had been proven once they were produced and marked as exhibits, despite the fact that the authenticity (let alone the truth) of the documents was never established by the respondent. The leave questions were answered as follows: question 1 — negative; question 2 — affirmative; question 3 — negative; and question 4 — affirmative, provided that the document had been properly admitted in evidence (see paras 39 & 41).

[Bahasa Malaysia summary

Pada 31 Mei 2019, responden memfailkan tindakan sivil di Mahkamah Tinggi terhadap perayu untuk mendapatkan kembali pinjaman tanpa faedah sebanyak RM7 juta yang telah diberikan kepada perayu melalui dua cek masing-masing berjumlah RM5 juta dan RM2 juta. Perayu mengakui bahawa ia telah menerima jumlah RM7 juta tersebut daripada responden tetapi menafikan bahawa ia adalah pinjaman tanpa faedah seperti yang didakwa oleh responden. Sebaliknya, ia adalah yuran komisen yang dipersetujui bagi perkhidmatan pembrokeran yang diberikan kepada responden untuk pemerolehan saham Ta Win Sdn Bhd, sebuah syarikat awam tersenarai, yang mana responden bercadang untuk mengambil alih kawalan, dan oleh itu tidak boleh dikembalikan. Responden menyediakan dua baucar untuk pengeluaran kedua-dua cek tersebut. DW2 yang memberi keterangan bagi pihak perayu mengesahkan bahawa tandatangan pada baucar itu adalah tandatangannya tetapi mendakwa bahawa perkataan yang ditaip 'Being paid as Advance to Tenggara Kapital Sdn Bhd' tidak ada pada masa beliau menandatangani dokumen itu (Tenggara Kapital Sdn Bhd adalah nama lama perayu). Untuk baucar kedua, terdapat pemadaman. Perkataan yang ditaip 'Being ===' telah digantikan dengan catatan tulisan tangan 'Advance to Tenggara'. Catatan tulisan tangan ini tidak ada ketika DW2 menandatangani dokumen tersebut. Perkataan yang ditaip dan catatan tulisan tangan memberikan tanggapan bahawa jumlah tersebut adalah pendahuluan seperti yang didakwa oleh responden dan bukan komisen seperti pembelaan perayu. Kedua-dua pihak bersetuju bahawa kedua-dua baucar itu adalah dokumen Bahagian C, yang bermaksud kedua-dua kesahihan dan kandungan dokumen tersebut dipertikaikan dan memerlukan bukti yang ketat. Semasa perbicaraan, kebolehterimaan baucar menjadi isu. Semasa pemeriksaan utama PW1, beliau mengenal pasti kedua-dua baucar itu sebagai baucar yang disediakan oleh syarikatnya untuk pengeluaran kedua-dua cek tersebut, yang mana peguam meminta agar dokumen tersebut ditanda sebagai IDP1 dan IDP2. Peguam yang bijaksana bagi pihak responden telah meminta agar IDP1 dan IDP2 ditanda sebagai ekshibit P1 dan P2 selepas DW2 mengesahkan bahawa tandatangan pada kedua-dua baucar itu adalah tandatangannya. Pesuruhjaya kehakiman yang bijaksana ('PK') menyelesaikan pertikaian tersebut dengan menandakan IDP1 dan IDP2 sebagai eksh P1 dan P2 'secara bersyarat'. Dalam menolak tuntutan responden, PK menerima keterangan DW2 bahawa catatan

dan pindaan pada kedua-dua baucar itu tidak ada ketika DW2 menandatanganinya, yang bermaksud ia telah ditambah atau dipinda oleh seseorang yang tidak dikenali oleh DW2 selepas beliau menandatanganinya. Walau bagaimanapun, Mahkamah Rayuan membatalkan keseluruhan keputusan Mahkamah Tinggi. Kegagalan perayu untuk melepaskan beban pembuktian telah menyebabkan Mahkamah Rayuan menerima kandungan kedua-dua baucar P1 dan P2 sebagai kebenaran, dengan itu memberikan responden bukti yang mencukupi untuk membuktikan tuntutannya bahawa RM7 juta itu adalah pendahuluan dan bukan komisen. Perayu telah diberikan kebenaran untuk merayu dengan persoalan undang-undang berikut: (a) di mana kandungan/catatan yang ditulis pada dokumen dipertikaikan dan/atau didakwa telah ditambahkan selepas dokumen itu ditandatangani/dimulakan, adakah kandungan/catatan itu dianggap terbukti apabila dokumen itu ditanda sebagai ekshibit di perbicaraan ('soalan 1'); (b) di mana kandungan/catatan yang ditulis pada dokumen dipertikaikan dan/atau didakwa telah ditambahkan selepas dokumen itu ditandatangani/dimulakan, adakah menjadi tanggungjawab pihak yang bergantung pada dokumen itu dan kandungan/catatan yang dipertikaikan untuk memanggil pembuat dokumen itu dan/atau penulis kandungan/catatan itu untuk membuktikan perkara yang sama ('soalan 2'); (c) apabila dokumen dikemukakan dan ditanda sebagai ekshibit semasa perbicaraan, adakah menjadi tanggungjawab mahkamah untuk menganggap keseluruhan kandungan dokumen tersebut sebagai telah dibuktikan ('soalan 3'); dan (d) di mana dokumen telah dikemukakan dan ditanda sebagai ekshibit semasa perbicaraan dan sebahagian daripada kandungannya dipertikaikan, adakah mahkamah diwajibkan untuk menilai kebenaran, ketepatan kandungan dokumen tersebut dan pemberatan yang harus diberikan kepada dokumen tersebut berdasarkan keterangan lisan dan keterangan dokumentari lain yang dikemukakan di hadapan mahkamah ('soalan 4').

Diputuskan, membenarkan rayuan:

(1) Adalah tidak tepat dari segi fakta bagi Mahkamah Rayuan untuk mengatakan bahawa responden telah mengemukakan baucar asal kerana ia tidak pernah dikemukakan di perbicaraan. Kedua-dua baucar itu, yang pada mulanya ditandakan sebagai IDP1 dan IDP2 (untuk tujuan pengecaman sahaja), telah ditukar kepada eksh P1 dan P2 (sebagai bukti kesahihan dan kebenaran kandungan) selepas DW2 mengenal pasti tandatangannya pada kedua-dua baucar tersebut. P1 dan P2 bukan baucar asal (lihat perenggan 21).

(2) Adalah salah bagi Mahkamah Rayuan untuk mengenakan beban pembuktian terhadap perayu. Sebelum sebarang beban undang-undang atau beban pembuktian beralih kepada perayu, ia mesti terlebih dahulu ditunjukkan bahawa responden telah berjaya mewujudkan suatu kes prima facie terhadap perayu. Untuk responden mewujudkan kes prima

A facie terhadap perayu atau, dengan kata lain, untuk membuktikan kesnya secukupnya untuk mewajarkan penghakiman yang memihak kepadanya jika tiada keterangan lain, adalah menjadi tanggungjawab responden untuk membuktikan, berdasarkan imbangan kebarangkalian, bahawa kedua-dua baucar P1 dan P2 adalah sahih dan mengandungi kebenaran. B Lebih penting lagi, untuk P1 dan P2 digunakan sebagai keterangan untuk menyokong tuntutan responden, ia mesti terlebih dahulu dibuktikan telah diterima masuk dengan betul sebagai keterangan (lihat perenggan 22, 24 & 26).

C (3) Seksyen 73A(1) Akta Keterangan 1950 tidak terpakai memihak kepada responden. Pertama, P1 dan P2 bukan baucar asal dan kedua, tiada usaha yang munasabah telah dibuat untuk mencari pembuat dokumen tersebut. Melainkan kesahihan kedua-dua baucar itu telah disahkan dengan memanggil pembuat dokumen tersebut, kandungan dokumen D tersebut kekal sebagai keterangan dengar cakap kerana tujuan mengemukakannya adalah untuk membuktikan kebenaran kandungan dan bukan semata-mata untuk membuktikan bahawa catatan dan pindaan telah dibuat. Hakikat bahawa DW2 menandatangani kedua-dua baucar pembayaran tidak menjadikannya pembuat dokumen E kerana pertikaian itu bukan mengenai tandatangannya tetapi mengenai kesahihan dan kebenaran kandungan. Oleh itu, adalah salah bagi PK untuk menukar IDP1 dan IDP2 kepada eksh P1 dan P2 semata-mata kerana DW2 mengesahkan bahawa tandatangan pada kedua-dua dokumen itu adalah tandatangannya. Kedua-dua kerani dan setiausaha F syarikat responden sepatutnya berada dalam kedudukan untuk mengemukakan keterangan terbaik yang ada kerana mereka akan dapat memberi keterangan mengenai catatan dan pindaan pada kedua-dua baucar pembayaran. Tiada penjelasan diberikan mengapa saksi-saksi ini tidak dipanggil atau disediakan di perbicaraan. Oleh itu, PK adalah wajar G dalam keadaan tersebut untuk membuat inferens bertentangan terhadap responden kerana gagal memanggil pembuat eksh P1 dan P2. Adalah jelas bahawa pada akhir kesnya, responden tidak mengemukakan sebarang keterangan dokumentari yang boleh dipercayai atau sebaliknya untuk membuktikan, atas dasar prima facie, bahawa RM7 juta itu adalah H pendahuluan dan bukan komisen. Oleh itu, tiada apa-apa untuk dijawab oleh perayu terhadap tuntutan responden bahawa RM7 juta itu adalah pendahuluan dan bukan komisen (lihat perenggan 28, 32 & 34–36).

(4) Walaupun Mahkamah Rayuan betul dalam tidak membenarkan perayu membangkitkan isu pemalsuan atas alasan ia tidak diplidkan, ia adalah I satu percanggahan dari segi untuk kemudian meletakkan beban pembuktian terhadap perayu untuk membuktikan pemalsuan kedua-dua baucar, atas alasan bahawa kandungan baucar telah dibuktikan sebaik sahaja ia dikemukakan dan ditanda sebagai ekshibit, walaupun fakta bahawa kesahihan (apatah lagi kebenaran) dokumen itu

tidak pernah diwujudkan oleh responden. Persoalan kebenaran dijawab seperti berikut: soalan 1 — negatif; soalan 2 — afirmatif; soalan 3 — negatif; dan soalan 4 — afirmatif, dengan syarat dokumen itu telah diterima masuk dengan betul sebagai keterangan (lihat perenggan 39 & 41).]

Cases referred to

Chong Khee Sang v Pang Ah Chee [1984] 1 MLJ 377; [1983] 1 LNS 57 (refd)
Mahmod Binkailan v Goh Seng Choon & Anor [1976] 2 MLJ 239, FC (refd)
Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd [2016] 8 MLJ 739, HC (refd)
Pioneer Conglomerate Sdn Bhd v Tenggara Kapital Sdn Bhd [2023] 5 MLJ 581, CA (refd)
Raja Chandranath Roy v Ramjai Mazumdar (1870) 6 BLR 303, PC (refd)
Stoney v Eastbourne Rural District Council [1927] 1 Ch 367, Ch D (folld)
Subramaniam v PP [1956] 1 MLJ 220, PC (refd)
Tetuan Wan Shahrizal, Hari & Co v PP [2023] 4 MLJ 1; [2023] 4 CLJ 843, FC (refd)

Legislation referred to

Courts of Judicature Act 1964 s 96, 96(a)
Evidence Act 1950 ss 67, 73A(1), 101, 102

Khrishna Dallumah (with Jasbeer Singh, Nur Hakimah Mohamad, Yong Yoong Hui and Aradhna Kaur) (Jasbeer, Nur & Lee) for the appellant.
Gurdit Singh a/l Kesar Singh (with Nashvinder Singh Gill) (Ram Yogan Sivam) for the respondent.

Abdul Rahman Sebli CJ (Sabah and Sarawak):

[1] The four questions of law that the appellant had been granted leave to appeal under s 96 of the Courts of Judicature Act 1964 ('the CJA') concern an important area of the law of evidence and procedure. They are as follows:

(a) where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, are the contents/notations deemed proven upon the document being marked as an exhibit at trial?

(b) where the contents/notations written on a document are disputed and/or alleged to have been added after the document was signed/initialled, is it incumbent upon the party relying on the document and the disputed contents/notations to call the maker of the document and/or the author of the contents/notations to prove the same?

A (c) when a document is tendered and marked as an exhibit during a trial, is it incumbent upon the court to treat the entire contents of the said document as having been proven? and

(d) where a document has been tendered and marked as an exhibit during a trial and part of its contents are disputed, is the court obliged to assess the veracity, truthfulness of the contents of the said document and the weight to be given to the said document on the basis of the oral and other documentary evidence adduced before the court?

C **[2]** As can be seen there is nothing novel about the questions. They relate to the trite and tested questions of burden of proof, admissibility of evidence and weight to be given to disputed documentary evidence produced and marked as exhibits during the course of the trial, the law on which is well settled and has not been the subject of any serious controversy as far as we are aware.

D

[3] The need for further argument before this court however arose due to the manner in which the Court of Appeal dealt with the disputed documentary evidence which may cause confusion and uncertainty at trials, bearing in mind its written grounds of judgment as reported in *Pioneer Conglomerate Sdn Bhd v Tenggara Kapital Sdn Bhd* [2023] 5 MLJ 581 binds all courts below the Court of Appeal based on the doctrine of stare decisis.

[4] It would be otherwise if no written grounds had been given, in which case the decision would have no binding effect: see the decision of this court in *Tetuan Wan Shahrizal, Hari & Co v Public Prosecutor* [2023] 4 MLJ 1; [2023] 4 CLJ 843. The questions posed for our determination are therefore questions of importance upon which a decision of this court would be to public advantage within the meaning of the second limb to s 96(a) of the CJA.

G

[5] The facts are simple. On 31 May 2019, the respondent (as plaintiff) filed a civil action in the High Court against the appellant (as defendant) for the return of an interest free loan of RM7m that it had advanced to the appellant vide two cheques dated 3 November 2017 and 15 November 2017 in the sums of RM5m and RM2m respectively.

[6] The appellant admitted that it had received the said sum of RM7m from the respondent but denied that it was an interest-free loan as claimed by the respondent. Rather, it was an agreed commission fee for the brokerage services it provided to the respondent for the acquisition of Ta Win Sdn Bhd ('Ta Win') shares, a public listed company, which the respondent intended to take control of, and therefore non-refundable.

[7] According to the appellant, the services were provided through the

respondent's Managing Director Dato' Chin Swee Chong (PW1) and that the services rendered had in fact led to the respondent gaining effective control of Ta Win.

[8] The respondent prepared two vouchers for the issuance of the two cheques. The first, dated 3 November 2017, was for the sum of RM5m. Dato' Sri Ngu Tieng Ung (DW2) who testified on behalf of the appellant confirmed that the signature on the voucher was his signature but alleged that the typewritten words 'Being paid as Advance to Tenggara Kapital Sdn Bhd' were not there at the time he signed the document (Tenggara Kapital Sdn Bhd was the former name of the appellant). The typewritten words gave the impression that the RM5m was an advance as claimed by the respondent and not a commission as pleaded by the appellant in its defence.

[9] The second voucher was for the sum of RM2m and was prepared by one 'Hanna' on 15 November 2017. There was a deletion on the voucher. The typed-out words 'Being ===' had been substituted with the handwritten notation 'Advance to Tenggara'. This handwritten notation was not there when DW2 signed the document. It gave the impression that the RM2m was an advance as claimed by the respondent and not a commission as pleaded by the appellant in its defence.

[10] After the bundle of documents were delivered to the appellant's solicitors before the trial, the appellant's solicitors requested for inspection of the original vouchers vide letters dated 9 October 2020 and 30 October 2020 but received no reply from the respondent. This prompted the appellant's representative to lodge a police report on 7 November 2020.

[11] It was agreed by both parties that the two vouchers were Part C documents, which means both the authenticity and contents of the documents were disputed and required strict proof. At the trial, the admissibility of the vouchers became an issue. This is reflected in the following engagements between the learned judicial commissioner ('JC') and learned counsel for the appellant:

> YA: But you have, you have, you confirmed that page 1 and 3 of Bundle B are treated as Part C documents, yes?
>
> RM: That's upon their request, Yang Arif.
>
> YTH: Actually we did write in to request for the original. We will share screen now on the letter.
>
> YA: No, no, that's alright. As long as it's already, it's considered as Part C document, the rest it depends on how you conduct the trial.
>
> YTH: Sure.

A YA: Issue of admissibility of the document, alright.

...

YA: The Part 1. Page 1 and 3 considered as Part C document.

RM: Yes.

B

[12] During the examination-in-chief of PW1, he identified the two vouchers as the vouchers that his company prepared for the issuance of the two cheques, following which counsel asked for the documents to be marked as C IDP1 and IDP2, which means the documents were produced for identification purposes only and not to prove the authenticity and truth of the contents. It was therefore acknowledged by counsel for the respondent that the authenticity and contents of IDP1 and IDP2 had yet to be proved.

D **[13]** PW1 was not the maker of IDP1 and IDP2 and therefore not in a position to verify the authenticity and truth of the contents. Learned counsel for the respondent told the court that he had the originals of IDP1 and IDP2 with him but as it turned out, they were never produced at any time during the trial. Nor were they established as secondary evidence of the originals.

E

[14] In cross examination, PW1 agreed with learned counsel for the appellant that the authenticity of IDP1 and IDP2 was disputed by the appellant. He further agreed that based on the balance sheet as at 31 December F 2017 signed by himself, there was an amount of RM45,418,070 for the investment of Ta Win shares. This sum included the RM5m and RM2m appearing on the two cheques dated 3 November 2017 and 15 November 2017 under the respondent's general ledger for the investment of Ta Win. The General Ledger, which was also signed by PW1, recorded 'Investment — G TAWIN'. Tellingly there was no mention of the word 'Advance' in the General Ledger, which is rather odd if indeed the RM7m was an advance and not a commission.

[15] At the defence stage of the hearing there was some disagreement over H the marking of IDP1 and IDP2 as exhibits. Learned counsel for the respondent had asked for IDP1 and IDP2 to be marked as exhs P1 and P2 after defence witness DW2 confirmed that the signatures on the two vouchers were his signatures, but was objected to by learned counsel for the appellant. The learned JC resolved the disagreement by marking IDP1 and IDP2 as exhs P1 I and P2 'conditionally' as can be seen from the following record of the proceedings:

YA: Yes, so I allow the documents to be admitted but expressly reserved the Defendant's right disputing the correctness or otherwise of the description. You are allowed to submit at the end of the day that there was tampering of this document

right but the fact is that there is such a document except that the content or description has been tempered with, that's description has been tampered with, that's all. Your position is not prejudiced at all, isn't it? A

TSC: Yes, Yang Arif, so long as it's recorded then we will leave it to submission.

B

[16] At the close of the case for the respondent, the appellant had the option of either to call evidence or not to call evidence. It chose the former. It turned out to be the right decision as the learned JC decided in its favour by dismissing the respondent's claim inter alia on the following grounds:

C

(a) the respondent's case rested entirely on the two payment vouchers exhs P1 and P2 which were disputed by the appellant as they had notations which were not present at the time the vouchers were acknowledged by the appellant's representatives. The notations made references to 'advances'. There was no evidence led by the respondent to explain when these notations were made and/or who added the notations on the payment vouchers after the appellant had signed the same. The authenticity and genuineness of these critical contents of the payment vouchers were disputed. However, the respondent did not lead any evidence to prove the authenticity and genuineness of the payment vouchers; D E

(b) the appellant's evidence was that the vouchers were filled in later and the handwriting notations were also inserted later;

(c) although the payment vouchers were tendered and conditionally marked as exhs P1 and P2, the veracity and authenticity of the disputed contents of the payment vouchers, specifically the notations thereon, had not been proven and therefore the respondent failed to discharge its burden of proof to satisfy the court that the payment was an advance which was repayable, as alleged by the respondent; F G

(d) the respondent's own documents showed that the RM7m was an agreed commission fee for the purchase of Ta Win shares. The respondent's General Ledger which was signed by the respondent's sole witness (PW1) and tendered as evidence in court noted that the RM7m was part of the 'Investment — Ta Win' totalling RM45,418,070. There was a glaring absence of any reference to 'advance' in the General Ledger; H

(e) the respondent failed to discharge its burden of proof that the RM7m was an advance, whether by way of any written document or loan agreement or even a Board of Director's resolution of the respondent authorising such advance, or any credible testimony of the respondent's witness to support the averment; I

(f) as the respondent failed to produce any cogent evidence to prove the

genuineness of the payment vouchers, it failed to discharge its burden of proof;

(g) the appellant on the other hand had called five witnesses to support its defence. DW2, a director of the appellant, testified that the payment vouchers were tampered with and the handwritten alterations on the payment vouchers particularly exh P2, were not made by him;

(h) a comparison of DW2's handwriting was done under s 67 of the Evidence Act 1950 before the court to prove that the handwriting was not that of DW2;

(i) the evidential burden remained with the respondent to prove the disputed contents of the payment vouchers and the identity of the person who made the notations; and

(j) on the balance of probabilities, the handwritten notations on the payment vouchers were not proven and that the respondent failed to discharge its legal and evidential burden of proving that the RM7m was an advance as alleged by the respondent.

[17] What is clear from the grounds of judgment is that the learned JC accepted DW2's evidence that the notation and alterations on the two vouchers were not there when DW2 signed them, which means they were added or altered by someone unknown to DW2 after he signed them. In short P1 and P2 had been tampered with.

[18] Despite this adverse finding of fact against the respondent, the Court of Appeal reversed the whole decision of the High Court for reasons which can be summarised as follows:

(a) the learned JC did not fully and judicially appreciate the fact that the appellant's allegation of tampering of exhs P1 and P2 with respect to the typewritten words and handwritten notation of the RM5m and RM2m was not pleaded;

(b) the handwriting of DW2 was not challenged and that the evidential burden had shifted to the appellant. The appellant could always produce its general ledger or audited accounts to show that the substantial sum of RM7m was received as a commission and not captured as a loan. That would have settled the matter;

(c) the appellant took 18 months to lodge a police report regarding the alleged alteration of the payment vouchers and this must be held against the appellant. The originals of P1 and P2 had been produced at the hearing and indeed if the appellant had wanted to examine the originals, they could have filed a discovery application for the originals to be produced and inspected;

(d) the appellant's application to amend was not allowed and the contemporaneous documents must be taken to mean what they say especially when the appellant itself had exhibited them in its striking out application without any qualification that the two payment vouchers had been tampered with;

(e) the learned JC failed to appreciate that the evidential burden had already shifted to the appellant to prove that the RM7m was not an interest free advance but a non-refundable commission. In the circumstances of the case the appellant failed to rebut that evidence of the respondent;

(f) the appellant's averment at the trial that the handwritten notes were added after DW2 had acknowledged the payment vouchers amounted to an allegation of forgery, which had to be proven by the appellant on a balance of probabilities;

(g) the appellant's solicitor failed to immediately take steps to notify the respondent's solicitor that the payment vouchers were forged, altered or tampered with;

(h) the appellant failed to commence court proceedings to challenge the payment vouchers; and

(i) since the appellant failed to discharge its evidential burden of proving forgery of the payment vouchers, it was incumbent on the learned JC to accept the contents of the payment vouchers as the truth and to enter judgment for the respondent.

[19] The evidential burden that the Court of Appeal was speaking of in sub-paras (b), (e), (f) and (i) above was supposedly the appellant's burden to prove that the vouchers had been forged, altered or tampered with. It was this failure by the appellant to discharge that evidential burden of proof that led the Court of Appeal into accepting the contents of the two vouchers P1 and P2 as the truth, thus providing the respondent with sufficient evidence to prove it's claim that the RM7m was an advance and not a commission.

[20] This penultimate finding of fact by the Court of Appeal on exhs P1 and P2 is found at para [31] of the grounds of judgment which we reproduce below for context:

> [31] We would conclude on the dispute pertaining to the validity and probative value of exhs P1 and P2 that as the appellant had duly produced the original documents and DW2 himself had admitted having signed these exhibits, the appellant had adduced sufficient evidence to discharge its onus of proof. Hence, the evidential burden shifted to the respondent to adduce sufficient evidence to prove the serious allegation of forgery and/or tampering. In all the circumstances alluded to, the respondent had clearly failed to discharge the onus of proving this sweeping

A allegation that exh P1 and P2, which were central to the appellant's claim were not genuine.

[21] First of all, it was factually incorrect for the Court of Appeal to say that the respondent had produced the originals of the two vouchers. The record shows that they were never produced at the trial. As we mentioned, the two vouchers, which were initially marked IDP1 and IDP2 (for identification purposes only), were converted to exhs P1 and P2 (as proof of authenticity and truth of contents) at the instance of learned counsel for the respondent after DW2 identified his signatures on the two vouchers. P1 and P2 were not the originals of the two vouchers.

[22] As for the burden of proof, we must say with all due respect that it was wrong for the Court of Appeal to have imposed such evidential burden of proof on the appellant. Before any burden legal or evidential shifted to the appellant, it must first be shown that the respondent had succeeded in establishing a prima facie case against the appellant. Should it fail to do so, the appellant need not even call evidence in answer to the respondent's claim as the respondent would then have failed to discharge its legal and evidential burden under ss 101 and 102 of the Evidence Act 1950 ('the Evidence Act') to prove its pleaded case that the RM7m was an advance and not a commission. To paraphrase the Privy Council in *Raja Chandranath Roy v Ramjai Mazumdar* (1870) 6 BLR 303, in that situation the appellant could say to the respondent: 'It is wholly immaterial whether I prove my case or not. You have not proved yours'.

[23] Prima facie evidence is that which, not being inconsistent with the falsity of the hypothesis, nevertheless raises such a degree of probability in its favour that it must prevail if believed unless rebutted or the contrary proved: See *The Dictionary of English Law* (1st Ed) edited by Earl Jowitt, the Lord High Chancellor of Great Britain 1945–1951 and Clifford Walsh, Solicitor of the Supreme Court. If on the face of it sufficient evidence exists to support a case, then a prima facie case is established. The following observations by Lord Hanworth MR in an old case of *Stoney v Eastbourne Rural District Council* [1927] 1 Ch 367, 397 is instructive:

> It appears to me that there can only be sufficient evidence to shift the onus from one side to the other if the evidence is sufficient *prima facie* to establish the case of the party on whom the onus lies. It is not merely a question of weighing feathers on the one side or the other, and of saying that if there were two feathers on one side and one on the other that would be sufficient to shift the onus. What is meant is, that in the first instance the party on whom the onus lies must prove his case sufficiently to justify a judgment in his favour *if there is no other evidence*. (Emphasis added.)

[24] In the context of the present case, 'other evidence' means other evidence coming from the respondent as claimant at the trial. Thus, for the respondent

to make out a prima facie case against the appellant or, to put it another way, to prove its case sufficiently to justify a judgment in its favour if there was no other evidence, it was incumbent on the respondent to prove, on the balance of probabilities, that the two vouchers P1 and P2 were both authentic and contained the truth. There can be no argument that without P1 and P2, the respondent would have no sustainable claim against the appellant as these two documents formed the pillars of it's case against the appellant without which the entirety of its case would collapse to the ground.

[25] The Court of Appeal relied on other documents produced by the respondent to support its finding that the respondent had proved its claim that the RM7m was an advance but these were merely supporting documents which were insufficient on their own and by themselves to justify a judgment in the respondent's favour if there was no other evidence. It was therefore wrong for the Court of Appeal to have substituted the High Court's finding of fact on P1 and P2 with it's own finding on the basis, as contended by the respondent, that the testimony of it's sole witness, namely PW1 was backed by unchallenged documentary evidence.

[26] More importantly, for P1 and P2 to be used as evidence in support of the respondent's claim, they must first be proved to have been properly admitted in evidence. It was not the duty of the appellant to ensure proper admission of the two documents as exhibits, let alone to prove that they had been forged, altered or tampered with.

[27] Although the Court of Appeal did not say so in so many words, it is clear that it accepted the respondent's contention that it had fulfilled the requisite conditions for the admission of the two vouchers under s 73A(1) of the Evidence Act. No reason was given for acceding to the respondent's argument other than to cite the High Court case of *Mohamad Fauzi bin Che Rus v JR Joint Resources Holdings Sdn Bhd* [2016] 8 MLJ 739. The section provides as follows:

> (1) Notwithstanding anything contained in this Chapter, in any civil proceedings where direct oral evidence of a fact would be admissible, any statement made by a person in a document and tending to establish that fact shall, on the production of the original document, be admissible as evidence of that fact if the following conditions are satisfied:
>
> (a) If the maker of the statement either —
>
> (i) Had personal knowledge of the matters dealt with by the statement; or
>
> (ii) Where the document in question is or forms part of a record purporting to be a continuous record, made the statement (so far as the matters dealt with thereby are not within his personal knowledge) in the performance of

A a duty to record information supplied to him by a person who had, or might reasonably be supposed to have had personal knowledge of those matters; and

(iii) If the maker of the statement is called as a witness in the proceedings:
Provided that the condition that the maker of the statement shall be called
B as a witness need not be satisfied if he is dead, or unfit by reason of his bodily or mental condition to attend as a witness, or if he is beyond the seas and it is not reasonably practicable to secure his attendance, or if all reasonable efforts to find him have been without success.

C **[28]** We do not see how the provision applies in favour of the respondent. First, P1 and P2 were not the originals of the two vouchers and secondly, no reasonable effort was made to find the maker or makers of the documents. In fact no effort at all was made. In *Mahmod Binkailan v Goh Seng Choon & Anor* [1976] 2 MLJ 239 the appellant had sought to prove that he was a
D labour contractor by producing a letter from a construction company, but no one from the company was called to give evidence. Suffian LP sitting with Lee Hun Hoe CJ (Borneo) and Ali FCJ of the former Federal Court said at p 240:

> At the trial Mr Tay tried to have this letter admitted in evidence under s 73A(1) of
E the Evidence Act, ie without calling anybody from the company to give evidence. Mr Tay called as witness a clerk of the plaintiff's solicitor who said he went to the company's premises on July 11, 1975, but found it's sign-board missing and was told by some people on the first floor that the company had shifted but nobody knew where to and that he could not find the company's address in the phone book either. The learned trial judge did not admit the letter on the ground that the
F witness never enquired from the Business Registration Department nor of the Registry of Companies. With respect I think that in these circumstances not all reasonable efforts have been made to find the author of the letter within the meaning of the proviso to sub-s (1) of s 73A of the Evidence Act and that therefore the learned judge was right in refusing to admit the letter.

G

[29] Did the learned JC follow the correct procedure in admitting and marking the two vouchers as exhibits? We think not. The proper procedure was for him to postpone the marking of IDP1 and IDP2 as exhs P1 and P2 until after the maker or makers of the documents were called to give evidence, which
H was never done. Until then, the two vouchers should remain as IDP1 and IDP2, ie for identification purposes only and not for the purpose of proving the truth of their contents as they were disputed both as to authenticity and contents. But to be fair to the learned JC, having converted IDP1 and IDP2 to exhs P1 and P2, he did give learned counsel for the appellant the right to
I challenge the correctness or otherwise of the 'description' of the two documents and to submit on tampering.

[30] By 'description' the learned JC could only mean the contents of P1 and P2 which he made clear the respondent still needed to prove although the two

documents had been marked as exhibits. But that goes more to the issue of weight rather than to the issue of admissibility. For any weight to be attached to the contents of the documents, the documents must first of all be documents that had properly been admitted in evidence. Nothing short of that will suffice.

[31] What the Court of Appeal set as precedent, a dangerous one we would say, is that the authenticity and contents of disputed documents, ie Part C documents need not be verified by the maker of the documents before they can be admitted in evidence and that all that is required of the party seeking to rely on such documents is to have them marked as exhibits, and once that is done, the contents of the documents are deemed to be the truth.

[32] With due respect to the learned judges of the Court of Appeal, the procedure they adopted is unknown to law. Unless the authenticity of the two vouchers had been verified by calling the maker or makers of the documents, the contents of the documents remained hearsay as the purpose of producing them was to prove the truth of the contents and not merely to prove that the notation and alterations were made (*Subramaniam v Public Prosecutor* [1956] 1 MLJ 220). Clearly, the respondent had no other purpose in producing P1 and P2 as exhibits other than to prove that the RM7m was an advance and not a commission. They were therefore caught by the rule against hearsay.

[33] A document cannot be admitted in evidence and marked as such until it has been properly proved: see the judgment of Shankar J (as he then was) in *Chong Khee Sang v Pang Ah Chee* [1984] 1 MLJ 377; [1983] 1 LNS 57. Such document has no evidential value, is irrelevant and should not be admitted in evidence and if admitted must be disregarded.

[34] The fact that DW2 signed on the two payment vouchers did not make him the maker of the documents as the dispute was not over his signatures but over the authenticity and truth of the contents. It was therefore wrong for the learned JC to have converted IDP1 and IDP2 to exhs P1 and P2 simply because DW2 confirmed that the signatures on the two documents were his signatures. For the same reason, it was misconceived for the respondent to have placed importance on the fact that the respondent admitted signing P1 and P2. Any other hypothesis would mean that anyone would be free to tamper with documents without the knowledge of the person who signed the documents and the documents could still be used against him without the need for the party seeking to rely on the documents to verify the authenticity of the documents. That cannot be a correct position of the law.

[35] Both the clerk and the company secretary of the respondent would have been in a position to adduce the best evidence available as they would be able to testify on the notation and alterations on the two payment vouchers as well

as the entries in the General Ledger. No explanation was proffered as to why these witnesses were not called or made available at the trial. It is trite law that failure to call material witnesses will result in the invocation of adverse inference. In *Sarkar on Evidence* (14th Ed), the learned authors dealt with the matter in the following terms:

> Everything is to be presumed against a party who keeps his adversary out of possession of evidence by taking means of retaining the evidence in his own custody. A similar presumption may also arise when a party does not call witnesses who are within his reach and are acquainted with the facts of the case ... When a party failed to call as his witness the principal person involved and who was in a position to give a first hand account of the matter in controversy and who could have refuted on oath the allegation on the other side, it is legitimate to draw an adverse inference ...

[36] The learned JC was therefore justified in the circumstances to draw adverse inference against the respondent for failing to call the maker or makers of exhs P1 and P2. Casting aside exhs P1 and P2 for being inadmissible and irrelevant, it is clear that at the close of its case, the respondent produced no credible evidence documentary or otherwise to prove, on a prima facie basis, that the RM7m was an advance and not a commission. There was therefore nothing for the appellant to answer to the respondent's claim that the RM7m was an advance and not a commission.

[37] At the risk of repetition it needs to be emphasised that the appellant had neither the legal nor evidential burden to prove forgery of the two vouchers or, for that matter, to prove anything at all if otherwise the respondent had failed to establish a prima facie case at the close of its case. The fact that the appellant opted to call evidence instead of submitting no case to answer at the close of the respondent's case does not change the equation. This error by the Court of Appeal on the burden of proof was an error that goes to the root of the matter which renders the whole judgment fundamentally flawed and liable to be set aside.

[38] In any case, as acknowledged by the Court of Appeal itself, forgery was not an issue before the court as it was not pleaded by both the appellant and the respondent. The pleaded case for the respondent was that the RM7m was an interest-free loan it advanced to the appellant whereas the pleaded defence for the appellant was that the RM7m was a non-refundable commission for the brokerage services it rendered to the respondent.

[39] That was the single most important issue before the High Court and indeed before the Court of Appeal. Forgery was not one of the issues. Therefore, while the Court of Appeal was correct in disallowing the appellant from raising the issue of forgery on the ground that it was not pleaded, it was a contradiction in terms for it to then place the evidential burden of proof on

the appellant to prove forgery of the two vouchers, on the ground that the contents of the vouchers had been proven once they were produced and marked as exhibits, despite the fact that the authenticity (let alone the truth) of the documents was never established by the respondent.

[40] That disposes of our determination of the appeal but for completeness, we set out below ss 101 and 102 of the Evidence Act which are codifications of the common law concept of burden of proof and on whom it lies. The provisions are clear and unambiguous and speak for themselves and need no further deliberation by us save for us to reproduce them for ease of reference:

Section 101 Burden of proof

(1) Whoever desires any court to give judgment as to any legal right or liability, dependent on the existence of facts which he asserts, must prove that those facts exist.

(2) When a person is bound to prove the existence of any fact, it is said that the burden of proof lies on that person.

ILLUSTRATIONS

(a) A desires a court to give judgment that B shall be punished for a crime which A says B has committed.

(b) A must prove that B has committed the crime.

(c) A desires a court to give judgment that he is entitled to certain land in the possession of B by reason of facts which he asserts and which B denies to be true.

(d) A must prove the existence of those facts.

Section 102 On whom burden of proof lies

The burden of proof in a suit or proceedings lies on that person who would fail if no evidence at all were given on either side.

ILLUSTRATIONS

(a) A sues B for land of which B is in possession, and which, as A asserts, was left to A by the will of C, B's father.

(b) If no evidence were given on either side, B would be entitled to his possession.

(c) Therefore the burden of proof is on A.

(d) A sues B for money due on a bond.

(e) The execution of the bond is admitted, but B says that it was obtained by fraud, which A denies.

If no evidence were given on either side, A would succeed as the bond is not disputed and the fraud is not proved.

Therefore the burden of proof is on B.

[41] For all the reasons aforementioned, our answers to the leave questions are as follows:

(a) leave question 1 — negative;

(b) leave question 2 — affirmative;

(c) leave question 3 — negative; and

(d) leave question 4 — affirmative provided the document has been properly admitted in evidence.

[42] It follows that the appeal must be allowed with costs and we so order. The decision of the Court of Appeal is set aside and the decision of the High Court is restored. My learned brothers Justice Abu Bakar Jais FCJ and Justice Vazeer Alam Mydin Meera FCJ have read this judgment in draft and have agreed with it. They have also agreed that this judgment shall form the judgment of the court.

Appeal allowed.

Reported by Nabilah Syahida Abdullah Salleh